No. 10,941

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

In the Matter of the Petition for Naturalization of

FONG CHEW CHUNG.

FONG CHEW CHUNG,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

OPENING BRIEF FOR APPELLANT.

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FILED

FEB - 8 [illegible]

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OPENING BRIEF FOR APPELLANT.

This is an appeal from an order of the District Court of the United States for the Northern District of California, Southern Division, denying his petition for naturalization.

JURISDICTIONAL STATEMENT.

(Rule 20, Section 2, Subdivision B, Rules of the United States Circuit Court of Appeals for the Ninth Circuit.)

The statutory provisions believed to sustain the jurisdiction are as follows:

(1) The jurisdiction of the District Court.

USCA, Title 8, Aliens and Nationality, Section 701(a), page 624:

"Exclusive jurisdiction to naturalize persons as citizens of the United States is hereby conferred upon the following specified courts: District Courts of the United States now existing * * * the jurisdiction of all the courts herein specified to naturalize persons shall extend only to such persons resident within the respective jurisdictions of such courts, except as otherwise specifically provided in this chapter."

There is no applicable exception.

(2) The jurisdiction of this Court upon appeal to review the judgment in question.

USCA, Title 28, Section 225(a), page 294:

"Appellate Jurisdiction—

(a) Review of final decisions. The circuit court of appeals shall have appellate jurisdiction to review by appeal or writ of error final decisions—

"First. In the district courts, in all cases save where a direct review of the decision may be had in the Supreme Court under section 345 of this title."

Section 225(d), page 295:

"(d) Circuits in which reviews shall be had. The review under this section shall be in the following circuit courts of appeals: the decision of a district court of the United States within a State in the

circuit court of appeals for the circuit embracing such State; * * *"

Tuten v. United States, 270 U. S. 568, 70 L. Ed. 738.

(3) Pleadings necessary to show the existence of jurisdiction.

(a) The petition for naturalization (Transcript of Record, pp. 3-6).

(4) The facts disclosing the basis upon which it is contended that the District Court had jurisdiction and that this Court has jurisdiction upon appeal to review the judgment in question.

On April 29, 1944, appellant filed in the Southern Division of the District Court of the United States for the Northern District of California his petition for naturalization (Tr. pp. 3-6, 7), alleging that he resided in San Francisco, California, was born in China, was lawfully admitted to the United States at San Francisco, California, entered the United States Army December 18, 1942. At a hearing in open Court statement of his military service was read in evidence showing that he was inducted December 18, 1942, honorably discharged August 5, 1943. (Tr. p. 26.)

In a written opinion dated May 22, 1944, the Court made the following order:

"Petition for naturalization is denied." (Tr. p. 38.)

Thereafter and on May 31, 1944, appellant filed his petition for reconsideration (Tr. pp. 38, 39). A further

hearing was had and the Court made the following order filed September 5, 1944:

"Petition will be denied." (Tr. pp. 39, 42.)

Notice of appeal was thereupon filed on October 7, 1944, in the District Court from the orders denying the petition for naturalization and the petition for reconsideration thereof, and praecipe for preparation of the transcript of record on appeal and statement of points on appeal were filed (Tr. pp. 44, 46).

ABSTRACT OF THE CASE.

As a wartime measure, Title X, "The Second War Powers Act", Act of March 27, 1942, 8 U.S.C., Section 1001, contains in pertinent part the following provision:

> "* * * Any person not a citizen, regardless of age, *who has served or hereafter serves honorably* in the military or naval forces of the United States during the present war and who, having been lawfully admitted to the United States, * * * may be naturalized upon compliance with all the requirements of the naturalization laws except that (1) no declaration of intention and no period of residence within the United States or any State shall be required; (2) the petition for naturalization may be filed in any court having naturalization jurisdiction regardless of the residence of the petitioner; (3) the petitioner shall not be required to speak the English language, sign his petition in his own handwriting, or meet any educational test; * * *" (italics supplied).

As indicated by its name, the Act was passed to meet the war emergency and provides for its own termination (Section 1001).

Thereafter appellant enrolled as a member of the Armed Forces on December 18, 1942, and was given an honorable discharge which for the purposes of this case contains two pertinent statements:

> First: "This certificate is awarded as a testimonial of honest and faithful service to his country." (Tr. p. 28.) This designates the character of his service.
>
> Second: "Honorably discharged by reason of: Section VIII AR 615-360 Paragraph 9 SO No. 170." This designates the reasons for his discharge.

The Army Regulation above referred to was issued under the authority of the Articles of War as follows:

> "The Articles of War.
>
> "The articles included in this section (sec. 1, Ch. II, act of June 4, 1920, 41 Stat. 787) shall be known as the Articles of War and shall at all times and in all places govern the Armies of the United States * * *
>
> "Art. 108. Soldiers—Separation From the Service.—No enlisted man, lawfully inducted into the military service of the United States, shall be discharged from said service without a certificate of discharge, signed by a field officer of the regiment or other organization to which the enlisted man belongs or by the commanding officer when no such field officer is present; and no enlisted man shall be discharged from said service before his term of

service has expired, except by the order of the President, the Secretary of War, the commanding officer of a department, or by sentence of a general court-martial." (Manual for Courts-Martial, U. S. Army 1928, pp. 203, 227.)

Section VIII, AR 615-360, November 26, 1942, in pertinent part provides:

"51a. Procedure * * * When an enlisted man—

(1) Is inapt, or

(2) Does not possess the required degree of adaptability for the military service after reasonable attempts have been made to reclassify and reassign such enlisted man in keeping with his abilities and qualifications, or

(3) Gives evidence of habits or traits of character * * * which serve to render his retention in the service undesirable, and rehabilitation of such enlisted man is considered impossible after repeated attempts to accomplish same have failed, or

(4) Is disqualified for service, physically or in character, through his own misconduct, and cannot be rehabilitated so as to render useful service before the expiration of his term of service without detriment to the morale and efficiency of his organization, his company or detachment commander will report the facts to the commanding officer."

"52a. No man will be separated from the service prior to the expiration of his term of service for any of the causes enumerated in paragraph

51a unless the Government can obtain no useful service from him by reason of his mental, moral, or physical disqualification once such man has been accepted for service as an enlisted man in the Army of the United States."

"54. Term to be used as cause of discharge.—a. In certificate of discharge.—The terms to be entered in the certificate of discharge as the reason for discharge will be merely 'Section VIII, AR 615-360; not eligible for reenlistment or induction'. b. In all papers other than certificate of discharge.—In stating the cause of discharge, a brief description of the actual cause thereof in the case in question will be given, followed by a parenthetical reference to these regulations, for example—

Inaptness (sec. VIII, AR 615-360).

Lack of adaptability for military service (sec. VIII, AR 615-360).

Habits (or traits of character) rendering retention in service undesirable (sec. VIII, AR 615-360).

(Physically) disqualified (in character) for service, through his own misconduct (sec. VIII, AR 615-360)."

"55. Form of discharge certificate to be given.—

a. Except as otherwise prescribed in b below, the discharge from the Army of the United States (blue) will be given.

b. An honorable discharge from the Army of the United States will be given when, according to the approved findings of the board of officers required

by paragraph 51c, the conduct of the enlisted man during his current period of service has been such as would render his retention in the service desirable were it not for his inaptitude or lack of required adaptability for military service. In such cases the discharge certificate will show that reenlistment is not warranted."

In view of the provisions of the foregoing paragraph 52a, the Court in its decision concluded:

"If the Government could 'obtain no useful service' from petitioner, how can it be said that he has 'served honorably', or at all? His inaptitude was not something which developed during the period of enlistment. It had always existed, which fact the Army, after repeated and reasonable attempts to make use of him, was forced to recognize. After induction it was found that petitioner was mentally disqualified to understand and perform any duties required of him.

"In my opinion petitioner has not served honorably, or at all. He has failed to meet the requirements of the statute." (Tr. pp. 37-38.)

The Court further said:

"A further hearing was had in the above matter upon application for reconsideration * * *

"I think the only legal issue that could possibly be presented is whether petitioner 'served honorably' within the meaning of Section 1001, 8 USCA. From the face of the record and a consideration thereof it appears to this court that he did not." (Tr. pp. 39, 40.)

Referring to the statement on appellant's honorable discharge, that it was awarded as a testimonial of honest and faithful service, the Court said:

> "I consider the effect of these words in making the decision. I concluded that when construed with petitioner's record while an enlisted man and the Army Regulation governing his discharge, these words are ineffective and not binding on the court so far as concerns the present proceeding. The very reason for the discharge as set forth in petitioner's army record negatives the idea that petitioner has served in any way within the contemplation of the statute." (Tr. p. 40.)

The question that arises therefore is whether an honorable discharge is or is not conclusive evidence indicating in the language of the statute that appellant has "served honorably in the military or naval forces of the United States during the present war". In other words, whether the finding of the Secretary of War on a matter of army administration is subject to review by civil courts.

SPECIFICATION OF THE ERRORS RELIED UPON.

1. That the Honorable District Court erred in denying appellant's petition for naturalization.

2. That the Honorable District Court erred in holding that a civil court has a right to review the administrative determination of appropriate military authority.

3. That the Honorable District Court erred in holding that it could go behind an honorable discharge duly issued to determine the character of a soldier's service.

4. That the Honorable District Court erred in holding that an honorable discharge duly issued by appropriate military authority is not conclusive of the character of a soldier's service.

ARGUMENT OF THE CASE.

SUMMARY OF THE ARGUMENT.

The wartime legislation (Title X, "The Second War Powers Act", Act of March 27, 1942, 8 U.S.C. 1001) waives a declaration of intention and the period of residence of an alien, permits the filing of a petition regardless of his residence and does not require a petitioner to speak the English language, sign the petition in his own handwriting or meet any educational test, provided, "he serves honorably in the military or naval forces of the United States and was lawfully admitted to the United States".

The Army Regulation under which appellant was discharged from the Army, Section VIII, AR 615-360, November 26, 1942, inhibits a statement as to the cause of discharge (paragraph 54). The same regulation (paragraph 55) permits two types of discharges, a blue discharge and an honorable discharge. A blue discharge is a discharge without honor. A board of officers is authorized to grant an honorable discharge. The board of officers awarded appellant an honorable

discharge under the authority of the regulation and used the language, "This certificate is awarded as a testimonial of honest and faithful service to his country." (Tr. p. 28.)

The statute involved makes lawful entry into the United States—not here material—and the character of the soldier's service the tests and only tests of right to citizenship. It is silent on the reason for the discharge, and the reason for the discharge therefore is wholly inconsequential.

Pursuant to regulations, a discharge is silent concerning the reason for its issuance (paragraphs 51a and 54). The Court therefore was without evidence upon which to predicate its findings in its several opinions as to that reason.

The Court stresses the provisions of paragraph 52a of the quoted regulations providing that no man will be separated from the service unless the Government can obtain no useful service from him. It is a matter of common knowledge and of frequent occurrence that a soldier, for reasons beyond his control or that lack wilfulness, may meet with circumstances that cause the character of his service to deteriorate and that reduce his capabilities by reason of qualities of character and apart from wilfulness, from efficiency to inefficiency, warranting his discharge under Section VIII. There is a field of infinite circumstances the impact of which upon the conduct of an excellent soldier will destroy his morale and warrant his discharge. Human conduct under varying conditions is unpredictable and

the regulation is intended to recognize that fact. There is no implication in such a discharge that the service of the soldier was never of value. Furthermore it is submitted that the board of officers authorized under paragraph 55 to issue a discharge without honor or an honorable discharge, had before it the full history of the soldier's service and authorized the honorable discharge in full knowledge of the provisions of paragraph 52a. The decision of the Honorable District Court trespasses upon an area of military administrative jurisdiction which if authorized, must necessarily lead to a lack of finality in matters of military cognizance and consequent confusion in military administration.

We appreciate and sympathize with the position of the learned District Court that citizenship should be denied to one who has performed no service for that high privilege. The obvious answers however, are first, there is no implication whatsoever in a discharge under Section VIII that the soldier has performed no service, second, that the authority for the determination of the character of a soldier's service is vested by regulations in a board of officers. Those regulations are the law of the land and thus binding upon the Courts as well as the Army, and the military determination is final and conclusive.

I.

JUDICIAL PROCESS DOES NOT EXTEND TO THE ADMINISTRATIVE ACTS OF AN OFFICER IN THE MILITARY SERVICE ACTING WITHIN THE SCOPE OF HIS JURISDICTION.

Pursuant to the cited regulations the Secretary of War through the board of officers found that appellant was entitled to an honorable discharge and accordingly, upon his separation from the service, issued and delivered that type of discharge to him though authorized to deliver a blue discharge, or discharge without honor. Their act in so doing is binding upon the Courts.

United States v. Eliason, 16 Peters 291, 302, 10 L. Ed. 968:

"The Secretary of War is the regular constitutional organ of the President for the administration of the military establishment of the nation, and rules and orders publicly promulged through him must be received as the acts of the executive, and as such, be binding upon all within the sphere of his legal and constitutional authority.

"Such regulations can not be questioned or defied, because they might be thought unwise or mistaken."

Kurtz v. Moffitt, 115 U. S. 458, states:

"Army regulations derive their force from the power of the President as Commander in Chief, and are binding upon all within the sphere of his legal and constitutional authority."

Reaves v. Ainsworth, 219 U. S. 304, 55 L. Ed. 225.

In this case under a federal statute the War Department retired an army officer. To review the proceedings of the board of officers discharging him, he sought certiorari. In upholding the dismissal of the proceeding the Court stated:

"To those in the military or naval service of the United States the military law is due process. The decision, therefore, of a military tribunal acting within the scope of its lawful powers can not be reviewed or set aside by the courts."

At page 306:

"The courts have no power to review. The courts are not the only instrumentalities of government. They can not command or regulate the Army. To be promoted or to be retired may be the right of an officer, the value to him of his commission, but greater even than that is the welfare of the country, and, it may be, even its safety, through the efficiency of the Army."

French v. Weeks, 259 U. S. 326, 335, 66 L. Ed. 965:

"It is settled beyond controversy that, under such conditions, decision by military tribunals constituted by an act of Congress, can not be reviewed or set aside by civil courts in a mandamus proceeding or otherwise. (Citing cases.)

"If it were otherwise, the civil courts would virtually administer the rules and articles of war, irrespective of those to whom that duty and obli-

gation has been confided by the laws of the United States, from whose decision no appeal or jurisdiction of any kind has been given to the civil magistrate or civil courts. Dynes v. Hoover, 20 How. 65, 82, 15 L. Ed. 838, 844."

Tyler v. Pomeroy, 90 Mass. 480, at page 484: "* * * with acts affecting military rank or *status* only or offenses against articles of war or military discipline, the civil courts have uniformly declined to interfere * * * (italics not supplied)."

Palmer v. United States, 72 C. Cls. 401: "The regulations established by the Treasury Department pertain solely to administrative matters * * * it appears to be well settled not only by court decisions but by an unbroken practice in the military service which dates back to a time long preceding the organization of our government, that the courts will not interfere with or review the action of proper officers in the military service done in some administrative proceeding and not in conflict with statute."

An illuminative discussion of the right of a civil tribunal to review an army discharge is found in *Nordmann v. Woodring,* 28 Fed. Supp. 573. The Secretary of War ordered the discharge of a sergeant with more than fourteen years honorable service becaused he failed to declare his intention to become a citizen. The soldier brought an action to review this order. In dismissing the action the Court said (page 575):

"There are certain limitations placed upon powers of courts beyond which a court can not go, and these involve the discretionary powers of the Executive Department. In this particular case a great injustice may have been done the plaintiff, at the same time if the courts assume the power to review every official act of an officer of the Army involving the conduct of many thousands of enlisted men, a condition might result which would not only be embarrassing to the courts and to the Executive Department but would in effect destroy the organization and discipline of the Army. Congress has seen fit to lodge the power to discipline the Army and the power to discharge an enlisted man prior to the termination of his enlistment, in the President, the Secretary of War and the commanding officer, and it is not the function of the court to question the wisdom or the advisability of an Act of Congress so long as it is not in direct conflict with the provisions of the Constitution * * *"

"Under section 2, Article 2 of the Constitution, U.S.C.A., the President is made the Commander in Chief of the Army and Navy of the United States. Under this section, as Commander in Chief, the President has the power to employ the Army and Navy in a manner which he may deem most effectual. This includes the power to establish rules and regulations for the government of the Army and the Navy and such regulations made pursuant to the authority thus conferred upon the President, have the force of law."

It appears therefore to be universally recognized by the Courts that administrative determinations by

proper army authorities are binding in every forum of the land. Thus when the army has acted and found appellant worthy of an honorable discharge and further stated that his discharge is awarded as a testimonial of honest and faithful service, it used language as apt as it is conclusive to bring appellant within the predicate for citizenship established by "The Second War Powers Act", namely, as one "who has served or who hereafter serves honorably in the military or naval forces of the United States".

II.

AN HONORABLE DISCHARGE IS THE FINAL JUDGMENT OF THE WAR DEPARTMENT UPON THE ENTIRE SERVICE OF A SOLDIER.

The Judge Advocate General, statutory adviser to the Secretary of War, has held as follows:

> "A soldier, tried for desertion, was sentenced to dishonorable discharge. Prior to the approval and execution of the sentence, he received from the Government, without fraud on his part, an honorable discharge on account of defective mental development. Held, that such discharge was valid and terminated his enlistment; that the Government is thereby estopped to discharge him in any other manner; and that he is entitled to pay from the date of the discharge." (220.8, July 11, 1918. Digest of Opinions JAG 1912-1940, page 380.)

> "An honorable discharge is in effect the judgment of the Government upon the entire military record

of the soldier during the period of enlistment. A soldier receiving a discharge with notation 'service honest and faithful' may be regarded as being in a state of honor *at all times during the enlistment terminated by such discharge,* even while serving a sentence to confinement at hard labor and forfeiture imposed by summary court-martial." (220.803, Feb. 7, 1923. Digest of Opinions JAG, 1912-1940, page 381.) (Italics supplied.)

"Two enlisted men were discharged to enable them to accept commissions. They were then appointed second lieutenants, without knowledge that they were below the statutory age. Held, that such discharge from military service, unless it was obtained by fraud, is final and can not be amended or revoked." (210.1, Jan. 24, 1918. Digest of Opinions JAG, 1912-1940, page 383.)

The determination of the Judge Advocate General that a discharge constitutes a final judgment of the War Department upon the military service of the soldier involved has been affirmed by the Courts.

United States v. Kelly, 82 U.S. 34, 21 L.Ed. 106.

In this case the United States appealed from a judgment of the Court of Claims in favor of a Civil War veteran for bounty money. The soldier deserted and was restored to duty without trial on condition that he make good time lost. Complying with this condition he was honorably discharged. The Government contended that his desertion forfeited his right to the bounty. In affirming the judgment the Court said:

> "We do not think that, under the circumstances, the bounty was forfeited. The able lawyer who fills at present the post of Judge Advocate General, in a case similar to the present, held that 'the honorable discharge of the deserter was a formal final judgment passed by the Government upon the entire military record of the soldier, and an authoritative declaration by it that he had left the service in a status of honor; * * * With this opinion we entirely concur."

In *Zearing v. Johnson,* 10 Cal. App. (2d) 654 at page 657, in a matter involving a veteran's tax exemption, the Court said in a practical paraphrase of the quoted language of the Judge Advocate General:

> "An honorable discharge is a formal and final judgment based by the government upon the military record of a member of its armed forces, and a declaration that such person had left the service in a status of honor."

CONCLUSION.

To summarize the foregoing argument we respectfully submit:

First: There is no evidence in the record as to the exact reason for the discharge of appellant from the army and therefore the finding of the District Court as to such reason is without a record predicate. The record is necessarily silent upon this subject because the Army Regulation (paragraph 54) prohibits the

statement upon the Certificate of Discharge of the actual cause for the discharge.

Second: The only conditions imposed by "The Second War Powers Act" upon the right of appellant to citizenship are two: first, that he be lawfully in the United States. That is admitted (Tr. p. 2). Second, that he shall have served honorably in the military service of the United States during the present war. He was given an honorable discharge which is conclusive proof of honorable service even without the additional statement thereon, "This certificate is awarded as a testimonial of honest and faithful service to his country."

This determination by military authority is binding upon the War Department, binding upon the Courts, and under the view of the Judge Advocate General supported by the cases quoted can not even be modified or revoked, except for mistake or fraud, by the War Department itself, much less by the Courts.

The Act confers the privilege of citizenship upon all soldiers who honorably serve, irrespective of how discharged. The Act is silent upon the cause for or method of discharge.

The judgment of the Secretary of War upon the entire service of the soldier is a conclusive judgment which can not be reviewed, modified or revoked by a civil court.

Accordingly it is respectfully submitted that the order of the Honorable District Court be reversed and

the cause remanded with a direction that, if otherwise appropriate, appellant's petition for naturalization be granted.

Dated, San Francisco, California,
February 8, 1945.

Respectfully submitted,
GUS C. RINGOLE,
Attorney for Appellant.